

March 2012

SUPERFUND INSTITUTIONAL CONTROLS MICHIGAN MODEL

THE ATTACHED MODEL DOCUMENT ENTITLED:

DECLARATION OF RESTRICTIVE COVENANT AND GRANT OF ENVIRONMENTAL PROTECTION EASEMENT

THIS DECLARATION OF RESTRICTIVE COVENANT AND GRANT OF ENVIRONMENTAL PROTECTION EASEMENT (DRC) IS A DRAFT DOCUMENT WHICH IS SUBJECT TO REVISION. LAND AND/OR RESOURCE USE RESTRICTIONS ARE APPLIED ON A SITE BY SITE BASIS, AND THE FORM AND CONTENT OF THE DRC ARE SUBJECT TO APPROVAL BY THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (MDEQ). THE FOLLOWING IS AN EXAMPLE OF THE FORMAT AND LANGUAGE FOR DRCS THAT HAS BEEN FOUND TO BE ACCEPTABLE TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE MDEQ.

NOTE: There are recording requirements for instruments filed with Michigan county register of deeds offices contained in Section 1 of the Recording Requirements, 1937 PA 103, as amended (Act 103), [MCL 565.201](#) *et seq.*

<p>The Michigan Department of Environmental Quality (MDEQ) will not discriminate against any individual or group on the basis of race, sex, religion, age, national origin, color, marital status, disability or political beliefs. Questions or concerns should be directed to the MDEQ Office of Human Resources, P.O. Box 30473, Lansing, MI 48909.</p>
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Read and Delete: Language to be added to this draft to make it Property-specific can be found in the document in brackets [] and in bold font. Drafting notes are bolded, bracketed, and italicized; and bold capital letters in parentheses (other than abbreviations) refer to information required as explained in the GUIDANCE FORM FOR INSTITUTIONAL CONTROLS (i.e., Restrictive Covenants) FOR SUPERFUND SITES (Guidance Form).

**DECLARATION OF RESTRICTIVE COVENANT AND
GRANT OF ENVIRONMENTAL PROTECTION EASEMENT**

[NOTE: See the Guidance Document, Introduction, for further explanation of transfer tax applicability. Use the following language if the amount of consideration for the transfer tax is less than \$100.00:

This transfer is exempt from County and State transfer taxes pursuant to MCL 207.505(a) and MCL 207.526(a), respectively.]

____(C)____ **Superfund Site, [insert name] County, Michigan**
MDEQ Site ID No. [insert number]
U.S. EPA Site No. [insert number]

MDEQ Reference No. ____ (A) ____

This Declaration of Restrictive Covenant and Grant of Environmental Protection Easement (“Restrictive Covenant and Easement”) is made on **[insert month/day/year]** by ____ (B) ____, the Grantor, whose address is **[Insert address, city, state, zip code]** for the benefit of the Grantee, the Michigan Department of Environmental Quality (“MDEQ”), whose address is P.O. Box 30473, Lansing, Michigan 48909-7926.

RECITALS

- i. The Grantor is the title holder of the real property located in **[insert name of County where Property is located]** County, Michigan and legally described in Exhibit 1 attached hereto (“Property”). The Tax ID number of the Property is **[insert Tax ID number]**.
- ii. The purpose of this Restrictive Covenant and Easement is to create restrictions that run with the land in the Grantor's real property rights; to protect the public health, safety, and welfare, and the environment; to prohibit or restrict activities that could result in unacceptable exposure to environmental contamination present at the Property; and to grant access to the Grantee, the

United States Environmental Protection Agency ("U.S. EPA") as a Third Party Beneficiary, and either agency's representatives to monitor and conduct Response Activities.

iii. A ____ (D) ____ has been issued by the U.S. EPA for the purpose of carrying out the Response Activities selected to address environmental contamination at the Site. The MDEQ [**"concurred" or "did not concur"**] with the ____ (D) ____ in a letter dated [**Insert month/day/year**]. The Response Activities summarized below are more fully described in the ____ (D) ____ and are being implemented by ____ (F) ____ [**Identify all other amendments, or modifications, if any, to the ROD or other Decision Document by including the following sentence:** The ____ (D) ____ also consists of ____ (E) ____ issued by the U.S. EPA on [**insert month/day/year**], that [**"is" or "are"**] being implemented by ____ (F) ____].

iv. The Property is associated with the ____ (C) ____ Superfund Site (the "Site"), MDEQ Site ID No. [**insert number**]. Hazardous substances, including [**list major known contaminants of concern**], have been released and/or disposed of on the Property. The Site was placed on the National Priorities List ("NPL") on [**insert month/day/year**] and is a facility as that term is defined in Section 101(9) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 *et seq.* ("CERCLA"); and Section 20101(1)(r) of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.20101 *et seq.* ("NREPA").

v. At the time of recording this Restrictive Covenant and Easement, ____ (H) _____. The U.S. EPA and the MDEQ have determined that the hazardous substances at the Property present a threat to human health through [**list all known and relevant human exposure routes, (i.e., direct contact, inhalation or ingestion)**]; and that the land use and resource use restrictions set forth below are required to prevent unacceptable exposures.

vi. The restrictions contained in this Restrictive Covenant and Easement are based upon information available to the U.S. EPA and the MDEQ at the time the ____ (D) ____ was issued. Failure of the Response Activities to achieve and maintain the criteria, exposure controls, and requirements specified in the ____ (D) ____; future changes in the environmental condition of the Property or changes in the applicable cleanup criteria; the discovery of environmental conditions at the Property that were not accounted for in the ____ (D) ____, regardless of the date of the release of hazardous substances contributing to those environmental conditions; or the use of the Property in a manner inconsistent with the restrictions described herein, may result in this Restrictive Covenant and Easement not being protective of public health, safety, and welfare, and the environment. Information pertaining to the environmental conditions at the Property and Response Activities undertaken at the Site is on file with the U.S. EPA and the MDEQ, Remediation Division.

vii. The MDEQ recommends that prospective purchasers or users of the Property undertake appropriate due diligence prior to acquiring or using this Property, and undertake appropriate actions to comply with the applicable requirements of Section 20107a of the NREPA.

viii. [**Insert one or both of the following, as applicable, if aesthetic exceedances exist in groundwater or soils or both:**

For Property with Groundwater aesthetic exceedances : The Grantor acknowledges, and the MDEQ has determined, that analysis of samples of groundwater underlying the [**"Property" OR "areas identified in Exhibit 2"**] has shown that hazardous substance concentrations in groundwater exceed the applicable aesthetic criteria under Part 201 for [**insert hazardous substance(s)**] due to smell and/or visual characteristics.

For Property with Soil aesthetic exceedances: The Grantor acknowledges, and the MDEQ has determined, that hazardous substance concentrations in soil at the [**“Property” OR “areas identified in Exhibit 2”**] exceed the applicable aesthetic criteria under Part 201 for [***insert hazardous substance(s)***] due to smell and/or visual characteristics.]

SUMMARY OF RESPONSE ACTIVITIES

[Insert a paragraph describing the affected media, the nature of the hazardous substances, and how the Response Activities required at the Site address risk for all relevant pathways that require restrictions. See examples in the Guidance Form at Paragraph G.1(a) and (b).]

[If appropriate, also identify conditions not addressed in the Record of Decision (ROD) or other Decision Document that are present in the groundwater and/or the soil and that exceed Part 201 criteria. See the example in the Guidance Form at Paragraph G.2.]

DEFINITIONS

“Grantee” shall mean the MDEQ , its successor entities, and those persons or entities acting on its behalf;

“Grantor” shall mean the title holder of any portion of the Property at any time after this Restrictive Covenant and Easement has been executed;

“MDEQ” shall mean the Michigan Department of Environmental Quality, its successor entities, and those persons or entities acting on its behalf;

“NREPA” shall mean the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.101 *et seq.*;

“Part 201” shall mean Part 201, Environmental Remediation, of the NREPA, MCL 324.20101 *et seq.*;

“Property” shall mean the real property legally described in Exhibit 1;

“Response Activities” shall mean, consistent with Section 101(25) of CERCLA, 42 U.S.C. Section 9601(25), such actions as have been or may be necessary to conduct any removal, remedy or remedial action, as those terms are defined in Sections 101(23) and 101(24) of CERCLA, 42 U.S.C. Sections 9601(23) and 9601(24), on the Property and/or at the Site, including enforcement activities related thereto;

“Site” shall mean the ____**(C)**____ NPL site;

“U.S. EPA” shall mean the United States Environmental Protection Agency, its successor entities and those persons or entities acting on its behalf; and

All other terms used in this document which are defined in Part 3, Definitions, of the NREPA; Part 201; or the Part 201 Administrative Rules (“Part 201 Rules”), 2002 Michigan Register 24, effective December 21, 2002, shall have the same meaning in this document as in Parts 3 and 201 of the NREPA and the Part 201 Rules, as of the date of execution of this Restrictive Covenant and Easement.

NOW THEREFORE,

[NOTE: Choose one of the following two options with the language that fits the circumstances under which the Restrictive Covenant and Easement is made:

OPTION 1: If appropriate, use the agreed-upon negotiated amount if the Grantor will be paid as consideration:

For consideration of \$[**amount**], and no other consideration, the receipt of which is hereby acknowledged, the Grantor, on behalf of itself, its successors and assigns hereby covenants and declares that the Property shall be subject to the restrictions set forth below, for the benefit of the Grantee, and grants and conveys to the Grantee, and its assigns and representatives, the perpetual right to enforce said restrictions. The Grantor further, on behalf of itself, its successors and assigns does grant and convey to the Grantee and its representatives an environmental protection easement of the nature, character, and purposes set forth below with respect to the Property, and the right to enforce said easement.]

OPTION 2: For most other situations, use the following:

For valuable consideration of less than \$100.00, the receipt of which is hereby acknowledged, the Grantor, on behalf of itself, its successors and assigns hereby covenants and declares that the Property shall be subject to the restrictions set forth below, for the benefit of the Grantee, and grants and conveys to the Grantee, and its assigns and representatives, the perpetual right to enforce said restrictions. The Grantor further, on behalf of itself, its successors and assigns does grant and convey to the Grantee and its representatives an environmental protection easement of the nature, character, and purposes set forth below with respect to the Property, and the right to enforce said easement.]

1. **Restrictions on Land Use:** The Grantor shall:

[Insert description of restrictions on land use necessitated by the ROD or other Decision Document; see the examples in Guidance Form at Paragraph I.]

2. **Restrictions on Activity:** The Grantor shall:

(a) Prohibit activities that cause existing contamination to migrate beyond the boundaries of the Property, increase the cost of Response Activities, or otherwise exacerbate the existing contamination located on the Property. The term "exacerbation" is more specifically defined in Section 20101(1)(q) of the NREPA, MCL 324.20101(1)(q).

(b) Prohibit and prevent use of the Property in a manner that may interfere with Response Activities at the Property, including interim response, remedial action, operation and maintenance, monitoring, or other measures necessary to assure the effectiveness and integrity of the remedial action.

[Include additional paragraphs if required to address specific prohibitions that are required to ensure the protectiveness of the remedy set forth in the ROD or other Decision Document. Examples of language of specific prohibitions can be found in the Guidance Form, Paragraph J.]

3. **Permanent Markers:**

[NOTE: Choose one of the following options, if appropriate. This permanent markers paragraph may be deleted if permanent markers are not required. If deleted, renumber the following paragraphs in the Restrictive Covenant and Easement as appropriate. See Guidance Form at Paragraph L for further information.

Option 1: *If permanent markers are required but not yet installed insert the following:* The Grantor shall allow the installation of permanent markers that have been approved by the U.S. EPA and the MDEQ within the Property boundaries. These permanent markers shall more or less describe the restricted areas of the Property and the nature of the prohibitions specified in the provisions of this Restrictive Covenant and Easement and the liber and page number of this Restrictive Covenant and Easement as recorded with the ***[insert name of county where Property is located]*** County Register of Deeds. The Grantor shall not remove, cover, obscure, or otherwise alter or interfere with any permanent markers placed on the Property at the locations generally depicted in Exhibit 2. The Grantor shall keep vegetation and other materials clear of any permanent markers to assure that the markers are readily visible.

Option 2: *If permanent markers are already installed, insert the following:* The Grantor shall not remove, cover, obscure, or otherwise alter or interfere with any permanent markers placed on the Property at the locations generally depicted in Exhibit 2. The Grantor shall keep vegetation and other materials clear of any permanent markers to assure that the markers are readily visible.]

4. **Management of Contaminated Soil, Media, and Debris:** The Grantor shall manage all soils, media and/or debris located on the Property in accordance with the applicable requirements of Section 20120c of Part 201, MCL 324.20120c and Part 111, Hazardous Waste Management, of the NREPA, MCL 324.11101 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.*; the administrative rules promulgated thereunder; and all other relevant state and federal laws and regulations.

5. **Access:** The Grantor grants the MDEQ and its representatives the right to enter the Property at reasonable times for the purpose of determining and monitoring compliance with the _____(D)_____ and with this Restrictive Covenant and Easement, including the right to take samples, inspect the operation of the Response Activities, and inspect any records relating thereto; and to perform any actions necessary to maintain compliance with Part 201 and the _____(D)_____.

Nothing in this Restrictive Covenant and Easement shall limit or otherwise affect the MDEQ's right of entry and access, or authorities to take Response Activities as defined in this Restrictive Covenant and Easement, as well as in NREPA, and any successor statutory provisions, or other state or federal law.

6. **Term:** This Restrictive Covenant and Easement shall run with the land and shall be binding on the Grantor, including persons as set forth in Paragraph 13(e), Successors.

7. **Third Party Beneficiary:** The Grantor, on behalf of itself and its successors, transferees, and assigns, hereby agrees that the United States, acting by and through the U.S. EPA, its successors and assigns, shall be a third party beneficiary ("Third Party Beneficiary") of all the benefits and rights set out in the restrictions, covenants, easements, exceptions, notifications, conditions, and agreements herein, and that the Third Party Beneficiary shall have the right to enforce the restrictions described herein as if it was a party hereto. No other rights in third parties are intended by this Restrictive Covenant and Easement, and no other person or entity shall have

any rights or authorities hereunder to enforce these restrictions, terms, conditions, or obligations beyond the Grantor, the MDEQ, their successors, assigns, and the Third Party Beneficiary.

8. **Enforcement:** The State of Michigan, through the MDEQ; and the United States of America, through the U.S. EPA as a Third Party Beneficiary, ***[and Enter the name of the owner or the entity responsible for assuring compliance with the Restrictive Covenant and Easement if appropriate]*** may enforce the restrictions and grant of easement set forth in this Restrictive Covenant and Easement by legal action in a court of competent jurisdiction.

9. **U.S. EPA Entry, Access, and Response Authority:** Nothing in this Restrictive Covenant and Easement shall limit or otherwise affect the U.S. EPA's right of entry and access, or authority to undertake Response Activities as defined in this Restrictive Covenant, as well as in CERCLA, the National Contingency Plan, 40 Code of Federal Regulations Part 300, and any successor statutory provisions, or other state or federal law. The Grantor consents to officers, employees, contractors, and authorized representatives of the U.S. EPA entering and having continued access to this Property for the purposes described in Paragraph 5, above.

10. **Modification/Release/Rescission:** The Grantor may request in writing to the U.S. EPA and the MDEQ, at the addresses provided in Paragraph 12, below, modifications to, or release or rescission of, this Restrictive Covenant and Easement. This Restrictive Covenant and Easement may be modified, released, or rescinded only with the written approval of the U.S. EPA and the MDEQ. Any approved modification to, or release or rescission of, this Restrictive Covenant and Easement shall be filed with the appropriate county Register of Deeds by the Grantor and a certified copy shall be returned to the MDEQ and the U.S. EPA at the addresses provided in Paragraph 12, below.

11. **Transfer of Interest:** The Grantor shall provide notice at the addresses provided in this document to the MDEQ and to the U.S. EPA of the Grantor's intent to transfer any interest in the Property, or any portion thereof, at least fourteen (14) business days prior to consummating the conveyance. A conveyance of title, easement, or other interest in the Property shall not be consummated by the Grantor without adequate and complete provision for compliance with the terms and conditions of this Restrictive Covenant and Easement and the applicable provisions of Section 20116 of the NREPA. The Grantor shall include in any instrument conveying any interest in any portion of the Property, including, but not limited to, deeds, leases, and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO A DECLARATION OF RESTRICTIVE COVENANT AND ENVIRONMENTAL PROTECTION EASEMENT, DATED ***[month, day, year]***, AND RECORDED WITH THE ***[name of county where Property is located]*** COUNTY REGISTER OF DEEDS, LIBER _____, PAGE _____.

12. **Notices:** Any notice, demand, request, consent, approval, or communication that is required to be made or obtained under this Restrictive Covenant and Easement shall be made in writing; include a statement that the notice is being made pursuant to the requirements of this Restrictive Covenant and Easement; include the MDEQ Site ID number and reference number; and shall be served either personally, or sent via first class mail, postage prepaid, as follows:

For the U.S. EPA:

Director
Superfund Division (SR-6J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.

Chicago, IL 60604

with a copy to:

Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

For the MDEQ:

Chief
Remediation Division
Michigan Department of Environmental Quality
P.O. Box 30426
Lansing, MI 48909-7926

13. **Miscellaneous:**

(a) **Controlling Law.** The interpretation and performance of this Restrictive Covenant and Easement shall be governed by the laws of the United States as to the obligations referred to in the _____ **(D)** _____, and by the laws and regulations of the State of Michigan for all other purposes hereunder (without reference to choice of laws and principles thereof). The right to enforce the conditions and restrictions in this Restrictive Covenant and Easement are in addition to other rights and remedies that may be available, including, but not limited to, administrative and judicial remedies under CERCLA or Part 201 of the NREPA.

(b) **Construction.** Any general rule of construction to the contrary notwithstanding, this Restrictive Covenant and Easement shall be liberally construed to achieve the purpose of this Restrictive Covenant and Easement and the policy and purpose of CERCLA and the land use restrictions and prospective use limitations required by Part 201. If any provision of this Restrictive Covenant and Easement is found to be ambiguous, an interpretation consistent with the purpose of this Restrictive Covenant and Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) **Severability.** If any provision of this Restrictive Covenant and Easement is held to be invalid by any court of competent jurisdiction, the invalidity of such provision shall not affect the validity of any other provision hereof, and all other provisions shall continue unimpaired and in full force and effect.

(d) **Entire Agreement.** This Restrictive Covenant and Easement and its attachments and appendices supersedes all prior discussions, negotiations, understandings, or agreements between the undersigned relating to the matters addressed herein, all of which are merged herein.

[Include language set forth in the Guidance Form at Paragraph K if other easements or agreements exist that are not to be superseded.]

(e) **Successors.** The covenants, terms, conditions, and restrictions of this Restrictive Covenant and Easement shall be binding upon; and inure to the benefit of, the Grantor and Grantee and their agents, successors, lessees, and assigns and any subsequent title holders, occupants or other persons acquiring an interest in the Property or a relevant portion of the Property, and their respective agents, successors and assigns. The rights, but not the obligations or authorities, of the U.S. EPA are freely assignable to any public entity, subject to the notice to the Grantor, its successors and assigns,

as their interests appear in the public title records kept and maintained by the **[name of County where Property is located]** County Register of Deeds.

14. **Exhibits:** The following exhibits are incorporated into this Restrictive Covenant and Easement:

Exhibit 1 – Legal Description of the Property **[NOTE: Form and directions for Exhibit 1 are found in the Guidance Form]**

Exhibit 2 – Survey of the Property **[NOTE: Survey must include the location of remedial components and, if appropriate, areas of the Property not addressed in the ROD or other Decision Document; form and directions for Exhibit 2 are found in the Guidance Form]**

[NOTE: List other exhibits as appropriate and number in sequential order. Additional information is available in the Guidance Form, as well as examples of additional exhibits that may be necessary:

Exhibit 3 – Allowable Uses **[Form and directions for Exhibit 3 are found in the Guidance Form.]**

Exhibit (___) – Permanent Markers **[See the Guidance Form at Paragraph L.]**

Exhibit (___) – Consent of Easement Holders **[See the Guidance Form at Paragraph M].**

15. **Authority to Execute Restrictive Covenant and Easement:** The undersigned person executing this Restrictive Covenant and Easement represents and certifies that he or she is duly authorized and has been empowered to execute this Restrictive Covenant and Easement.

IN WITNESS WHEREOF, **[insert name of Grantor]**, the Grantor, has caused this Restrictive Covenant and Easement to be executed on this _____ day of _____
_____ **[insert month and year]**.

Signature

Printed Name

Title

STATE OF _____)
COUNTY OF _____) ss

Acknowledged before me in _____ County, Michigan, on _____,
_____ **[insert month, day, and year]** by _____.

Notary Public, State of _____
County of _____
My commission expires: _____
Acting in the County of _____

The MDEQ approves the form and content of this Restrictive Covenant and Easement on this _____ day of _____ **[insert month and year]**.

BY: _____
[Name of Division Chief], Chief
Remediation Division
Department of Environmental Quality

STATE OF _____)
)ss
COUNTY OF _____)

Acknowledged before me in _____ County, Michigan, on _____,
_____ **[insert month, day, and year]** by _____.

Notary Public, State of _____
County of _____
My commission expires: _____
Acting in the County of _____

This Document Prepared By:

Bradley J. Ermisch
Michigan Department of Environmental Quality
Remediation Division
525 West Allegan Street
Lansing, Michigan 48933-2125